

PAC 10

51

Big East

45

It could be argued that this represents the number of games potentially available to local stations. The inference being that stations have no interest in carrying these games. To assume that local stations do not want to televise any of these games is simply absurd. The examples provided by INTV demonstrate that there is genuine interest in contracting directly with schools to broadcast football games. It is not a question of a lack of interest. It is a problem of attempting to dodge exclusivity windows and contracts entered into with the conferences, the networks and cable sports channels.

Importantly, Congressional concern with preclusive contracts in college sports cannot be mollified by simply demonstrating that there are more college football games on television because of cable sports channels. Congress was concerned about games leaving over-the-air television. More importantly Congress expressly asked for:

The number of professional and college sporting events that could have been made available to local television stations, but for exclusive arrangements between cable sports services, basic cable sports services and pay-per-view services.³⁹

It is apparent that there are a number of college football games that broadcasters could broadcast but are unable to do so.

³⁹House Commerce Committee Rep. No. 102-628, 102nd Cong. 2d Sess, June 29, 1992 at 126.

Cable interests simply fail to make their case by detailing the number of games that appear on sports channel services.

Assume arguendo, that cable is correct and there is no local station interest in broadcasting local college football games. If this is true, then there is no reason for creating exclusive windows. ABC, ESPN, and cable sports channels would have nothing to fear, because local stations would not carry these games. INTV suspects this is not the case. As ABC noted, the reason for exclusive arrangements is to reduce head to head competition by limiting output and driving up prices. INTV submits this is contrary to public policy.

Adding to the problem of exclusive windows, is the development of ABC's pay-per-view package. At first blush the plan sounds reasonable. ABC broadcasts games on a regional basis. In distant markets, where these games are not televised, ABC will offer them on a pay-per-view basis. Cap Cities/ABC notes that it broadcast the Stanford v. Washington PAC-10 game on the West Coast and placed the Florida v. Georgia and Ohio State v. Iowa games on pay-per-view.

In years gone by, however, local television stations were able to secure the rights to out-of-market contests through broadcast syndicators. For example, WTMV-TV in Tampa, Florida, used to carry Big Ten football. Today it cannot secure these rights.

It seems clear that ABC's proposal is just a first step. In a few years, all games that are not telecasted by ABC or ESPN may

find their way to pay-per-view. Again, the step will appear reasonable. After all, these CFA, Big Ten and PAC-10 games were not being televised. (Of course the reason most of these games are not televised is because of ABC and ESPN's exclusive window contracts with the conferences.) If this happens, however, local stations will be completely unable to broadcast any college football games involving CFA, Big Ten and Pac-10 teams.

IV. MAJOR LEAGUE BASEBALL

Contrary to assertions by Major League Baseball and the major cable interests, there is a significant sports siphoning problem in baseball. To analyze the issue correctly, the FCC must subdivide the problem into two parts. National rights have historically been sold by the league to one of the three major broadcast networks. The league has also sold national cable distribution rights to ESPN.⁴⁰

The second aspect of the problem, and the one of most concern to local television stations, is the sale of local rights by the teams (not the league) to local television stations and cable sports channels.

⁴⁰INTV's concern about the ESPN contract is that the Wednesday night exclusivity provision directly impairs the traditional rights of local stations.

A. National Rights

1. Broadcast Networks

Not surprisingly, ABC and NBC do not appear to believe there is a significant migration problem.⁴¹ Given NBC's interest in cable sports channels and ABC's ownership of ESPN, one would expect them not to be concerned.

Interestingly enough, NBC accepts the premise that moving games from over-the-air television to cable channels raises important policy concerns.

Acquisition of the exclusive rights to such games and series by subscription media would leave substantial portions of the population -- those without access to cable or those too poor to afford it -- unable to watch the most important games. Nearly four in ten households do not receive cable television, and therefore have no access to subscription service.⁴²

Of course NBC expresses this concern only in the context of post-season and special event games. Any concerns over regular season games is obviously tempered by its interest in cable sports channels.

UNRECORDED COPY WITH NBC'S CONCLUSION REGARDING THE SOCIAL

concern to special event and post-season games.⁴³ Contrary to NBC's assertion, local major league baseball games are not "fungible." Each game is unique. Local citizens who help fund stadiums with tax breaks and improvements should not become disenfranchised from the regular season games by the local sports teams they support.

INTV has no doubt that today the major television networks have the resources and economic power today to acquire and broadcast major league sports, including professional baseball. Given the fact that at least two of the networks are heavily involved in cable sports services, they are probably in a position to control their own destiny. Moreover, the FCC recently permitted all the networks to own cable systems. Thus, at the national level and for post-season games, issues regarding sports migration away from the Big Three broadcast networks may resemble the old adage: "We have met the enemy and they are us."⁴⁴

⁴³Indeed, former Congressman Tom McMillen once suggested that the country may be better off by permitting the leagues to market major post season games on a pay-per-view basis. The phenomenal revenues gained from such a strategy would take the economic pressure of the leagues, permitting them to place more regular season games on over-the-air television. The public would benefit because the absolute number of games appearing on over-the-air television, hence available to all Americans, would not suffer or perhaps increase. INTV does not support this idea. However, there may be a trade-off between permitting post season games to shift to cable in order to preserve more regular season games for over-the-air television.

⁴⁴Of course if the networks decide to move games on to their own cable channels, the public will suffer.

The Big Three networks are trying to position themselves for the next round of contract negotiations with Major League Baseball for national rights. Indeed, their market position may force a reduction in the price for the limited number of games of the week and post season play. This does not mean, however, that local stations, which contract directly with the teams are similarly positioned.

Indeed, network pressure to reduce the price of its baseball package creates an increased incentive to shift more games to cable at the national level. At the local level it will force up the prices paid by stations for local broadcast rights and accelerate the shift of games to pay cable services or cable sports channels.

This is not idle speculation. The Wall Street Journal recently analyzed the situation in Major League Baseball. It noted that if rights fees at the national level decline, Major League Baseball could more than make up for any losses by shifting more local games to cable services or by the league creating a direct pay-per-view package.

On the revenue side of the equation, owners predict that the value of national television contracts will be halved, from about \$350 million a year currently, when they are put out for bid again next year. Players don't deny that the contracts may shrink - after all, CBS Inc. has estimated a total after-tax loss on its current four-year contract of \$170 million - but they argue that this won't be catastrophic because national broadcasting accounts for less than a quarter of baseball's revenues.

Mr. Fort goes so far as to predict that increases in the value of local cable-TV contracts will "more than swamp what's going to happen in a national TV

contract." And whatever happens in the immediate future, baseball observers suggest that if the much-discussed vision of interactive, pay per view media comes to pass, the future value of baseball as software will be vast beyond calculation.⁴⁵

In sum, the negotiations for national rights may negatively impact the availability of local games.

2. ESPN's Baseball Contract

Taken in its historical context, the present ESPN contract with major league baseball represents such a shift. CBS's last \$1.1 billion agreement radically altered the strategy for network telecasts. Its 1990-1993 contract contained only a small number of regular season games compared to previous years. Instead CBS became the sole owner of post season rights. At the same time the league was able to obtain an additional \$400 million from ESPN for an additional 175 regular season games.⁴⁶

Of course, as part of the deal ESPN demanded exclusivity against local television stations on Wednesday nights.⁴⁷ ESPN recognized that baseball is, for the most part, a local game. People tend to watch their local teams as opposed to more national games. Thus the only way to ensure ESPN's position was

⁴⁵Wall Street Journal, April 2, 1993 at 1

⁴⁶Broadcasting, March 5, 1990 at 5.

⁴⁷Pay cable channels were not subject to the Wednesday night exclusive window. Such discriminatory treatment enhanced the ability of local pay cable channels to telecast games on the most popular nights for baseball and placed local station at a

to restrict the output of games available for telecast. Restricting the output of games on Wednesday nights all but eliminated head to head competition and enhanced the value of ESPN's package.

ESPN argues that Wednesday night exclusivity has not decreased the number of games available locally. It most certainly has. Wednesday night is the most popular night for the broadcast of local baseball. (Which is why ESPN got exclusivity on Wednesday nights as opposed to some other night.) Even if local stations were able to air games on other nights this does not mean there was no harm to local stations. First, there was a loss of overall audience because stations could not telecast games on the most popular baseball night. Second, when broadcasting "away" games, a local station's crew had to "waste a night," not a very productive result. Finally, 40 percent of the American public was denied access to games they otherwise would have seen. For example, in Chicago, WGN has the rights to the Cubs and White Sox. Normally they would broadcast Wednesday night games over-the-air for the millions of fans in Chicago. However, on Wednesday nights they have to shift the games to the Chicago Land cable service because of ESPN's exclusive window.

The Notice recognizes that ESPN's contract will be renegotiated in the very near future. However, there is nothing to indicate that ESPN will decline to renew its arrangement in some form. There will be adjustments, but the modifications will not be conducive to over-the-air television. As we noted in our

initial comments Major League Baseball wants to be on ESPN.⁴⁸ It appears that it may be for a lower price and perhaps fewer games. However, ESPN wants to increase its exclusivity.

ESPN says it's still interested in carrying MLB games, but expects to pay about half what it did for fewer games.

ESPN also wants more exclusivity against local broadcast and regional cable networks or the ability to bypass blackout restrictions.⁴⁹

Thus, the net impact of ESPN's potential new arrangement may be to exclude more games from over-the-air television than under its present contract by expanding its generic exclusivity window from Wednesday night to other nights during the week. In addition, if the price paid for the contract is significantly less, Major League Baseball may seek another cable purchaser.⁵⁰

In sum, it does appear there may be a price rollback for national broadcast and cable contracts. Electronic Media indicates that there may be as much as a \$400 - \$450 million dollar decline from existing national arrangements.⁵¹

Unfortunately there will be significant ramifications on the broadcasting of local games. In order to maintain a national level contract for regular season games, there will be tremendous pressure on Major league Baseball to grant ESPN additional nights of exclusivity. This will increase the number of games not

⁴⁸Broadcasting, March 15, 1993 at 43.

⁴⁹Electronic Media April 5, 1993 at 30.

⁵⁰Id.

⁵¹Id.

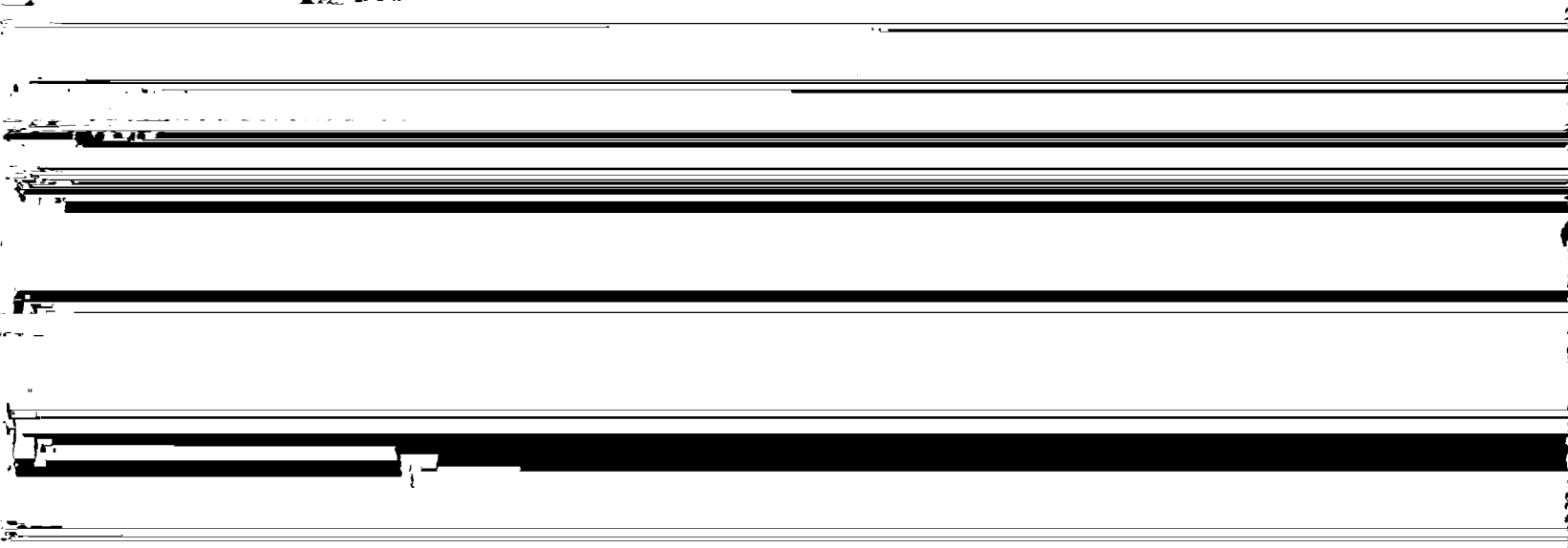
available on over-the-air television. Second, additional contracts with other cable programmers no doubt will contain similar exclusivity windows. Finally, it will place tremendous pressure on local teams to up the price of local rights that are sold to local broadcasters and cable sports channels. Such increased price pressure will accelerate the number of games leaving over-the-air television.

Congress and the Commission must watch the next round of national rights negotiations carefully. These packages may have significant negative ramifications on the subsequent rights packages that are made available by local teams to local broadcast stations.

B. Local Rights

Our initial comments documented a decline in the number of local games appearing on over-the-air television and a concomitant rise in the number of games appearing on local pay television channels.

In response MLB has submitted data revealing that the number



on regional sports cable channels increased from 215 in 1980 to 1146 in 1993.⁵³ INTV submits that these figures do not tell the whole story and mask the real issue.

First, the fundamental issue in this proceeding is whether local major league baseball games are migrating from over-the-air television to regional cable services. Aggregate data based on the number of games does not address the issue. You have to examine and compare those markets where regional cable services have acquired rights and those markets where they do not. Major League Baseball's data do not provide you with a yearly, market by market comparison. It only breaks down over-the-air vs. cable on a market-by-market basis for the 1993 season.

Our initial comments observed that in markets where regional cable services exist, there has been a discernable shift in the number of games away from over-the-air television. The real issue is whether there is a direct inverse relationship in each market between the number games appearing on over-the-air television and the number of games appearing on cable sports channels. Based on data obtained from annual baseball reviews appearing in Broadcasting, our initial comments documented such an inverse relationship in the following markets:⁵⁴

⁵³Id. If the Rockies and marlins are included there will be 1206 games appearing on regional cable sports channels in 1993.

⁵⁴This inverse relationship may well exist in other markets. Unfortunately, prior to 1984, Broadcasting only sporadically reported the number of games broadcasted on television. By 1984, most markets had cable sports channels. Thus, in some markets it

Boston: In 1980 there were 103 games broadcast. In 1984 NESN was created and off-air games fell to 70.

New York: As of 1986, 100 off-air games were telecast. In 1987 the SportsChannel cablecast 100 games. Off-air telecasts fell to 53. MSG now owns the rights to all Yankee games. Under an expiring agreement between WPIX and MSG, 50 games now appear off-air.

Minneapolis: In 1988, 73 Twins games were broadcast off-air. Recent agreements result in 60 games being televised.

Cleveland: In 1980, 70 games were televised. Today 60 are televised.

Baltimore: In 1980, 57 games were televised. Today, 50 games are seen off-air.

White Sox: In 1981, 60 off air games were seen. Today only 48 appear on off-air television.

Mets: In 1985, 90 games were broadcast. Today only 70 games are seen off air.

Houston: In 1984, 75 games were seen off-air. Today, only 63 games will be seen off air.

~~43 - was not recorded, possibly a result of information received in~~

are several markets with no cable sports channels. In these markets the number of off-air games have increased. Off-air broadcasts have increased in Milwaukee, Kansas City, Seattle and St. Louis. INTV believes it is simply incorrect to use the increase in games in markets with no cable sports channel coverage as evidence that there is no sports migration problem in baseball.⁵⁵

Second, Major League Baseball's statistics include off-air broadcasts by the superstations. According to baseball, superstations account for 695 broadcasts in 1993.⁵⁶ However, the superstations are unique. The two major superstations own the baseball teams. Ted Turner owns both WTBS and the Atlanta Braves. The Tribune owns both WGN and the Cubs. Certainly, it is somewhat inaccurate to consider the off-air telecasts of these teams as evidence that sports migration is not taking place. Yet that is precisely what Major League Baseball has done.

It is even more ironic that Major League Baseball would use off-air games from superstations in their analysis, given the

⁵⁵Of course this leads to a more fundamental question. Why have cable sports channels failed to carry baseball games in these markets? Importantly, it is not a case where cable sports channels are outbid by broadcast stations. Indeed, in St. Louis and Milwaukee, cable telecasts were tried and the sports channels had no problems securing rights. It may be market size, population density, faulty marketing or a host of factors outside the scope of this proceeding. The point is that in markets where cable sports channels exist, they have successfully siphoned games away

fact that it has done everything it could to eliminate out of market carriage of the superstations.⁵⁷

Finally, statistics based on existing contractual arrangements understate the potential for migration in the future. Of the existing local contracts, 19 will expire by 1995 or sooner. One will expire in 1996, four in 1997. Only two contracts will run to the end of the decade.

As a result, in the next two or three years almost all of the local contracts will be renegotiated. As noted above renegotiations are likely to occur at a time where there will be less revenue from national contracts. In 1980, local rights fees were approximately \$38.6 million.⁵⁸ By 1992, local fees, including broadcasting and cable, skyrocketed to \$258 million.⁵⁹ If there is a shortfall in fees at the national level, you can be sure the teams will attempt to make it up at the local level.

Given the state of the local broadcast industry, it is difficult to believe that local stations will be in a position to absorb these costs. A single revenue stream simply won't generate enough revenue. You can be sure that "creative" pay cable options will become the teams' safety valve.

⁵⁷Comments of Major League Baseball at 14.

⁵⁸Broadcasting, March 10, 1980 at 33.

⁵⁹Broadcasting, March 16, 1992 at 21.

V. NATIONAL BASKETBALL ASSOCIATION

Our initial reports showed that from 1985 to 1990 the

the 1991-1992 season.⁶¹ In Boston, WLVI-TV used to broadcast

games have shifted to cable services. The station even lost the rights to the Rochester Red Wings, a minor league club. From 1980 to 1990 the station broadcast 6 Red Wing Games. Since 1991, the games have appeared on WGRC, a local cable channel.

VII. CONCLUSION

INTV urges the FCC to carefully examine the clear pattern of sports siphoning that is occurring today. While sports rights present the FCC with a complex issue, there is one fundamental problem. Local television stations, with their single channel and one source of revenue, simply cannot cover the costs of ever increasing sports rights. The problem is structural. It is based on the technical and economic differences that exist between cable, with its dual revenue stream and broadcasting.

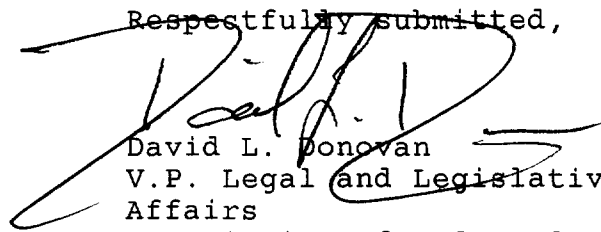
INTV believes the FCC has ample authority to enact sports siphoning rules or to recommend that Congress enact appropriate legislation. As we observed in our initial comments, the factors that lead the court to strike down the FCC's old siphoning rules are not relevant to today's marketplace. The world has changed since the HBO case.⁶² Cable is now the dominant medium. This fact was expressly recognized in the recent affirmance of the

⁶²Home Box Office, Inc. v. FCC, 567 F.2d 9 (1977)

must-carry rules by a three judge panel of the U.S. District Court for the District of Columbia.⁶³

Every time a game migrates from over-the-air television to a cable service, 40 percent of American citizens lose access. This situation cannot stand. We urge the FCC to recommend to Congress that it enact legislation to: 1) prevent preclusive contracts granting exclusivity to specific time blocks and 2) enact permanent sports siphoning rules.

Respectfully submitted,



David L. Donovan
V.P. Legal and Legislative
Affairs
Association of Independent
Television Stations, Inc.
1200 18th St., N.W.
Washington, D.C. 20036
(202) 887-1970

April 12, 1993

⁶³Turner Broadcasting System, Inc. v. Federal Communications Commission, Civil Action No 92-2247, slip op, (D. D.C., April 8, 1993).